



A REPORT
TO THE
MONTANA
LEGISLATURE

LEGISLATIVE AUDIT
DIVISION

20P-01

PERFORMANCE AUDIT

Administration of the Petroleum Tank Release Cleanup Fund

*Department of Environmental Quality and
Administratively Attached Petroleum Tank
Release Compensation Board*

OCTOBER 2021

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PERFORMANCE AUDITS

Performance audits conducted by the Legislative Audit Division are designed to assess state government operations. From the audit work, a determination is made as to whether agencies and programs are accomplishing their purposes, and whether they can do so with greater efficiency and economy.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Members of the performance audit staff hold degrees in disciplines appropriate to the audit process.

Performance audits are conducted at the request of the Legislative Audit Committee, which is a bicameral and bipartisan standing committee of the Montana Legislature. The committee consists of six members of the Senate and six members of the House of Representatives.

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October 2021

The Legislative Audit Committee
of the Montana State Legislature:

This is our performance audit of the Petroleum Tank Release Compensation Board, which is administratively attached to the Department of Environmental Quality.

This report provides the legislature information about the eligibility and reimbursement processes at the board. This report includes recommendations for better defining the roles of the board and the department when cleaning up petroleum tank releases; changing the way cleanup work is contracted; and seeking legislation that plans for the future of the fund when most historical releases are closed. Written responses from the board and the department are included at the end of the report.

We wish to express our appreciation to board members and personnel as well as staff at the department for their cooperation and assistance during the audit.

Respectfully submitted,

/s/ Angus Maciver

Angus Maciver
Legislative Auditor

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APPOINTED AND ADMINISTRATIVE OFFICIALS

**Petroleum Tank
Release Compensation
Board**

| | |
|---|-------------|
| Terry Wadsworth, Executive Director | Helena |
| Keith Schnider, Chair | Great Falls |
| Gretchen Rupp, Vice-Chair (through June 2021) | Bozeman |
| Heather Smith | Bozeman |
| Ed Thamke, (through June 2021) | Helena |
| Mark Johnson | Bozeman |
| Calvin Wilson | Bozeman |
| Jason Rorabaugh (through June 2021) | Belgrade |

**Department of
Environmental
Quality**

| |
|--|
| Chris Dorrington, Director |
| Jenny Chambers, Administrator, Waste Management and Remediation Division |



MONTANA LEGISLATIVE AUDIT DIVISION

Administration of the Petroleum Tank
Release Cleanup FundPETROLEUM TANK RELEASE COMPENSATION BOARD,
ADMINISTRATIVELY ATTACHED TO THE
DEPARTMENT OF ENVIRONMENTAL QUALITY**BACKGROUND**

The seven-member governor-appointed Petroleum Tank Release Compensation Board oversees a staff of six and manages the Petroleum Tank Release Cleanup Fund. The fund, financed by a \$0.0075 per gallon fee on gasoline and other fuels, reimburses owners of underground storage tanks for costs associated with cleaning environmental damage caused by leaking tanks.

Attached to: Department of
Environmental Quality

Board Chair:
Keith Schnider, Great Falls

Executive Director:
Terry Wadsworth

Annual Fund Revenue:
Approximately \$7 million in
fiscal year 2020

The Petroleum Tank Release Compensation Board is largely effective in its review and reimbursement of claims in environmental cleanup at the sites of leaking storage tanks. Unfortunately, Montana has long lagged the nation in the percentage of historic leaks that have been closed. To improve performance, we found the board could collaborate with the Department of Environmental Quality to review corrective action plans before department approval. There is an opportunity for saving board time and resources by having corrective action plans be competitively bid rather than the board applying its current cost control processes. When Montana's backlog of leaks is cleaned up, the state must decide whether a public financial assurance model is the best for the citizens of Montana. A more in-depth analysis by the board of potential options would help inform this decision.

KEY FINDINGS:

The board's entire review of corrective action plans should take place earlier in the process. The board does not fully review plans until they are approved by the department. Statute indicates it would be more appropriate for the board to review plans prior to the department's approval.

The board is inappropriately reviewing technical details of corrective action plans. The department should have the final say in how cleanups are facilitated. The board should review cleanups for cost and to ensure sites are eligible for reimbursement from the fund.

A competitive bidding process for contracted cleanup projects would save board staff time and should result in efficient cleanups. The board expends significant resources reviewing costs associated with corrective action plans and costs remitted for reimbursement by consultants. Bidding projects competitively, as is done for contracts throughout state government, would establish the costs of projects before corrective action plans are approved, for a potentially lower cost.

For the full report or more information, contact the Legislative Audit Division.

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The board can do more to present options to the legislature for consideration as the state's backlog of releases is closed. Some states have made participation in their cleanup funds optional, while others require tank owners to buy insurance on the private market.

RECOMMENDATIONS:

In this report, we issued the following recommendations:

To the board/department: 3

To the legislature: 1

RECOMMENDATION #1 (page 17):

We recommend the Petroleum Tank Release Compensation Board work with Department of Environmental Quality to collaborate during corrective action plan development to verify eligibility, assure fund availability, and provide any other relevant input for consideration prior to final plan approval by the department.

Board response: **Concur**

Department response: **Concur**

RECOMMENDATION #2 (page 20):

We recommend the Montana Legislature clarify statute by making amendments as needed to clarify the Petroleum Tank Release Compensation Board does not have a role in approving or basing reimbursement on the specific methods prescribed within approved corrective action plans that bring an eligible petroleum release to closure.

RECOMMENDATION #3 (page 28):

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to develop a process, seeking legislation if necessary, whereby remediation projects are competitively bid to bring releases to closure, in accordance with existing state procurement laws.

Board response: **Conditionally Concur**

Department response: **Concur**

RECOMMENDATION #4 (page 33):

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to seek legislation that prepares the fund for the eventual closure of all historic underground storage tank release in Montana.

Board response: **Partially Concur**

Department response: **Concur**

Chapter I – Introduction and Background

Introduction

Responding to a growing national awareness of the threat to public health and the environment of leaking underground petroleum tanks, the Montana Legislature in 1989 established the Petroleum Tank Release Cleanup Fund (fund). The fund meets the financial assurance requirement of the Environmental Protection Agency (EPA) by providing a funding mechanism for owners of underground petroleum storage tanks and is used to reimburse the costs of remediating environmental damage caused by leaks from these tanks.

At the time of the creation of the fund in 1989, many states around the country were taking similar steps to address a legacy of leaking underground petroleum tanks. While not every state has adopted the same model for funding cleanups, most states created a state fund in an effort to hasten the environmental cleanup. Over the past several decades, states have had mixed levels of success in cleaning up underground petroleum leaks. According to the EPA, of the 559,000 underground petroleum releases identified across the country as of September 2020, 497,000 have been cleaned up.

Over the last three decades, Montana's fund has supported the clean-up of 1,581 releases. Statewide Montana has made significant progress in cleaning up historical releases, but there remain 929 known underground leaks in the state that need to be cleaned up. Of these, the owners of 706 have applied to the fund for reimbursement eligibility and are at various stages of the cleanup process. The remaining 223 have not applied to the fund for reimbursement for a variety of reasons, such as the property being used for business at present and no desire to disrupt that for remediation. These releases may pose additional future liability for the fund. It should be noted that there is no deadline for application to the fund, or statutory compulsion to do so.

To oversee the management of the fund, the legislature created the Petroleum Tank Release Compensation Board (board). The seven-member board is administratively attached to the Department of Environmental Quality (DEQ). Members are appointed by the governor to staggered three-year terms and oversee the activity of six fund staff who handle the day-to-day operations of the fund. The board includes representation from the following industries and areas of expertise: petroleum distribution; banking; petroleum release remediation consulting; insurance; service station dealers; environmental regulation; and the public.

In recent years, the legislature has demonstrated heightened interest in hastening the pace of cleanup and closure of leaks from underground petroleum storage tanks in Montana. The Legislative Audit Committee prioritized a performance audit of the board and its activities, to assess whether the board and department are adhering to their statutory roles and working as collaboratively and efficiently as possible toward the goal of remediating underground petroleum leaks.

How the Fund Works

The fund is financed by a \$0.0075 (three-quarters of a cent) fee per gallon of fuel levied on the distribution of petroleum products and collected from distributors by the Department of Transportation. Distributors are typically wholesale sellers of gasoline, diesel, and other petroleum products, primarily to gas stations but also to agricultural operations and other businesses. The fund

pays for cleanup of releases from petroleum storage tanks, both historic releases and newly detected leaks, provided certain statutory criteria are met regarding the nature and timing of the leak and the actions of the owner. In recent years, the fund has received roughly \$7 million each year from the collection of this fee.

DEQ is responsible for regulation of underground tanks and release cleanup and provides administrative support to the board. The board works with the Waste Management and Remediation Division of the department, specifically the Underground Storage Tanks (UST) Section and the Petroleum Tank Cleanup Section (PTCS). The UST Section, organized under the Waste & Underground Tank Management Bureau, fills regulatory and preventative roles and includes four environmental science specialists (two of these positions were vacant during audit work) as well as technical support. The PTCS, organized under the Contaminated Site Cleanup Bureau, focuses on remediation and includes another 12 environmental science specialists.

Historically, the cleanup program has been structured so that DEQ provides the technical expertise and works with tank owners and environmental consultants on the cleanup process, while the board maintains the fiduciary responsibility over the fund, assures eligibility requirements are met by tank owners and consultants, and manages the cash flow and reimbursement functions.

The Eligibility Question: How Tank Owners Access the Fund

In order for a release to be eligible for reimbursement from the fund, owners and operators have to meet certain criteria, related to both the timing and nature of the release, as well as to how the owner responds upon discovering the contamination. Eligibility for fund reimbursement is detailed in §75-11-308, MCA. Some of the more significant factors that determine eligibility for fund reimbursement as determined by the board include:

- ♦ The leak came from a tank that was in compliance with applicable state laws and administrative rules at the time of the leak.
- ♦ If the owner was unaware of a tank on the property at the time a release was discovered, the owner must apply to DEQ for a closure permit within 30 days and must then close the tank within the time specified on the permit.
- ♦ The leak must be accidental in nature.
- ♦ As work progresses, owners are responsible for half of the first \$35,000 spent on a cleanup (or, a co-pay of \$17,500), with the fund picking up all cleanup costs after that up to a total of \$1 million per release. (Smaller tanks have a \$5,000 co-pay and a maximum fund exposure of \$500,000.)

In addition to actions taken by the owner to maintain eligibility, the board also determines if the contamination itself qualifies as eligible for reimbursement. This includes ensuring that the contamination is a petroleum product (as opposed to other chemical or form of contamination) that came from an eligible underground storage tank. In cases where a site is contaminated by multiple releases, the board may ask for information from DEQ that estimates the percentage of contaminants that came from each eligible tank or release.

As part of its application review, the board determines whether an owner has private insurance coverage. Statute mandates that if private insurance is available, that it is billed for cleanup costs prior to the fund.

Board staff applies administrative rules to determine eligibility for reimbursement of the release and contaminants on site. The board itself has the authority to grant reimbursement even in cases where rules say it is not warranted, based on a majority vote of board members.

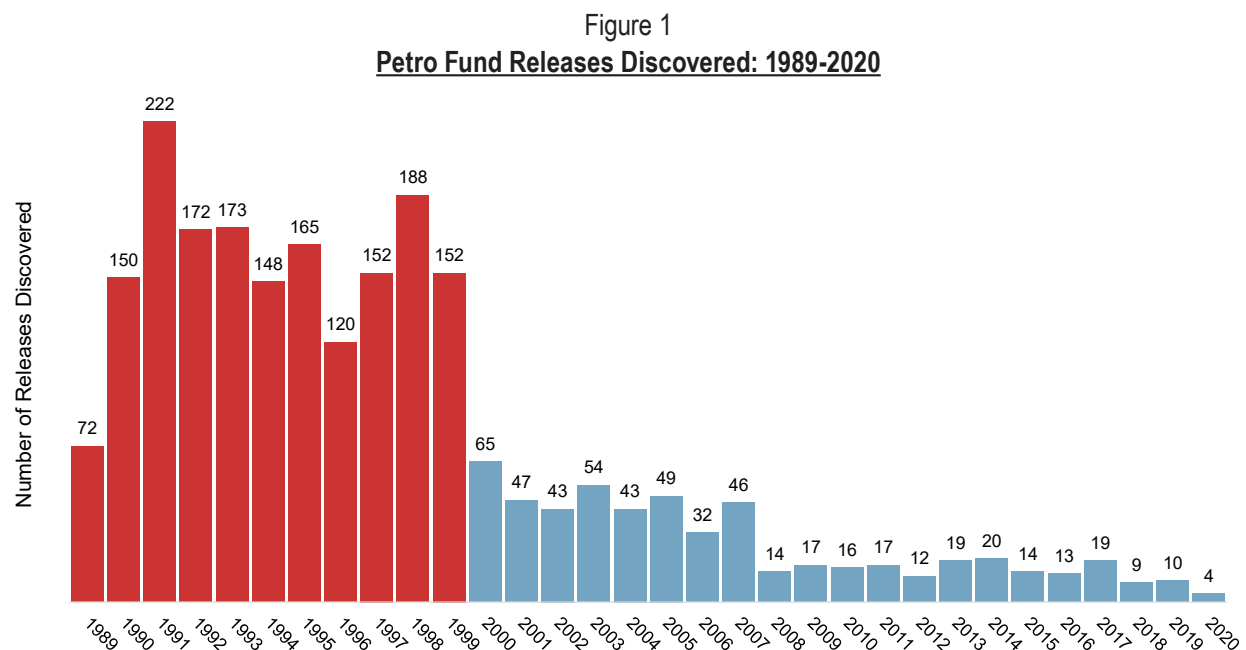
Fund Background and History

In describing the 32-year history of the fund, it is helpful to break the timeline up into distinct phases in which priorities and the environmental landscape were evolving.

Early Years (pre-2000)

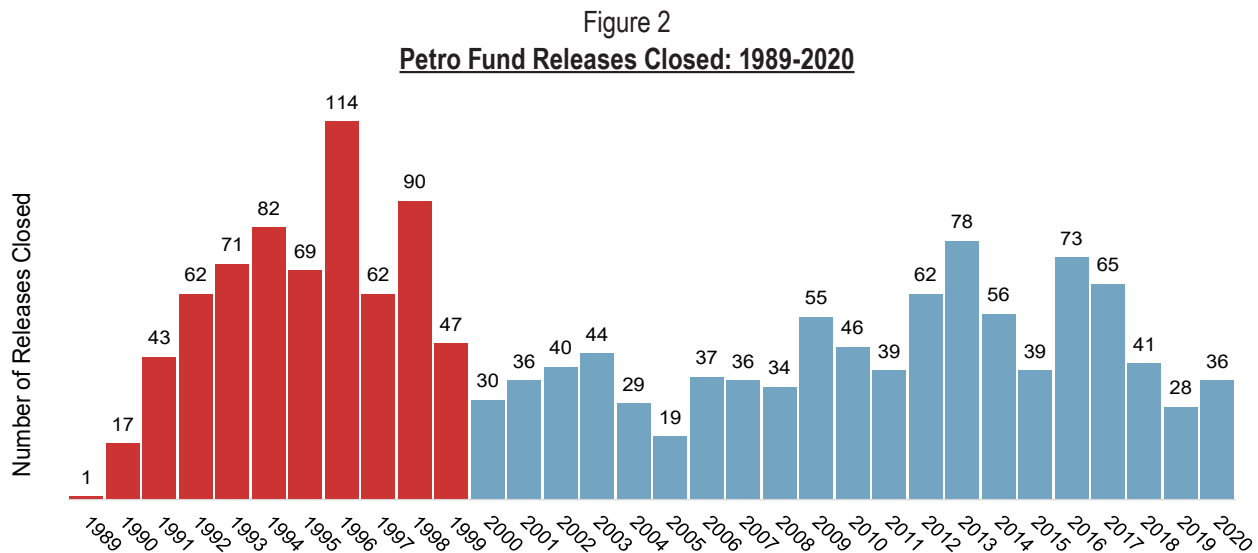
The fund was established in 1989 as a supplemental form of funding to clean up underground storage tank leaks. As Figures 1 and 2 illustrate, this era saw the largest number of leaks discovered and closed, respectively. Significant numbers of leaking tanks from the preceding several decades were identified from digging up old underground tanks as well as a general national awareness of the hazards of leaking underground tanks and the adoption of new requirements by the EPA. While many of these discovered releases were small and could be quickly remediated, others were larger and have proved more difficult to close. Approximately 30 percent of the releases discovered during this time frame remain open and account for the majority of known current open releases.

Figure 1 indicates the number of underground storage tank leaks that have engaged in the fund eligibility process, shown by the year they were discovered, from 1989 to 2020. The initial era of the program as described herein is shown in red in Figure 1 below. As the figure shows, the majority of releases were discovered prior to 2000.



Source: Compiled by Legislative Audit Division from release data provided by board staff.

Figure 2 below indicates the number of underground storage tank leaks that have been through the fund process and have been deemed by DEQ to be cleaned and closed annually from 1991 to 2020. A site is deemed “closed” when the department determines that contaminant levels are at or below state standards and prescribed remediation work has been satisfactorily completed. The data shows a burst of cleanup activity in the early years of the fund, followed by a lull in the era described in the following section. Note that closures tend to lag discoveries, illustrated in the previous figure, by a period of years, as the projects move through the eligibility process and work is done to move sites to closure.



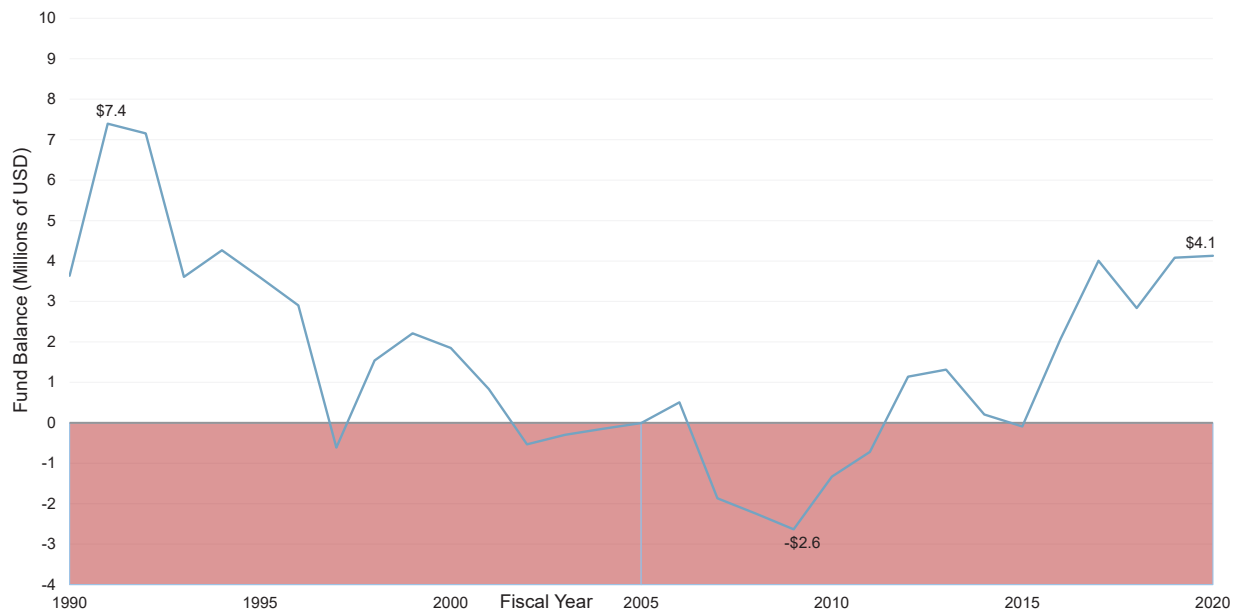
Source: Compiled by Legislative Audit Division from closure data provided by board staff.

Stabilizing a Diminished Fund (2000-2011)

In the first decade of the 2000s the fund often was in debt and borrowing money from the Montana Board of Investments to meet obligations. This was due to a combination of a significant number of releases being discovered and reported during this time frame as well as mismanagement of the fund in controlling the outflow of reimbursements. This contributed to delays in the start of work for some releases because the fund did not have money to obligate toward corrective action plans. A 2003 performance audit recommended a number of changes to shore up the fund. This included that the board proactively manage and reduce liabilities to promote fund solvency. Over the next several years, the board intentionally slowed the fund’s outflows by not obligating funds as quickly as in the past, in order to build its balance and stability. The board also, over many years, developed cost control measures and processes to assess individual claims against the fund to ensure efficient use of money.

Figure 3 (see page 5) illustrates the fund balance over time. While statute allows the board to borrow money from the Board of Investments to cover temporary cash shortfalls and meet cleanup obligations if the fund itself is depleted, in practice the board seeks to avoid this tactic and obligates money for projects with an eye toward future fund solvency and its ongoing ability to reimburse costs.

Figure 3
Petroleum Tank Release Cleanup Fund Balance Over Time



Source: Compiled by Legislative Audit Division from fund balance data provided by board staff.

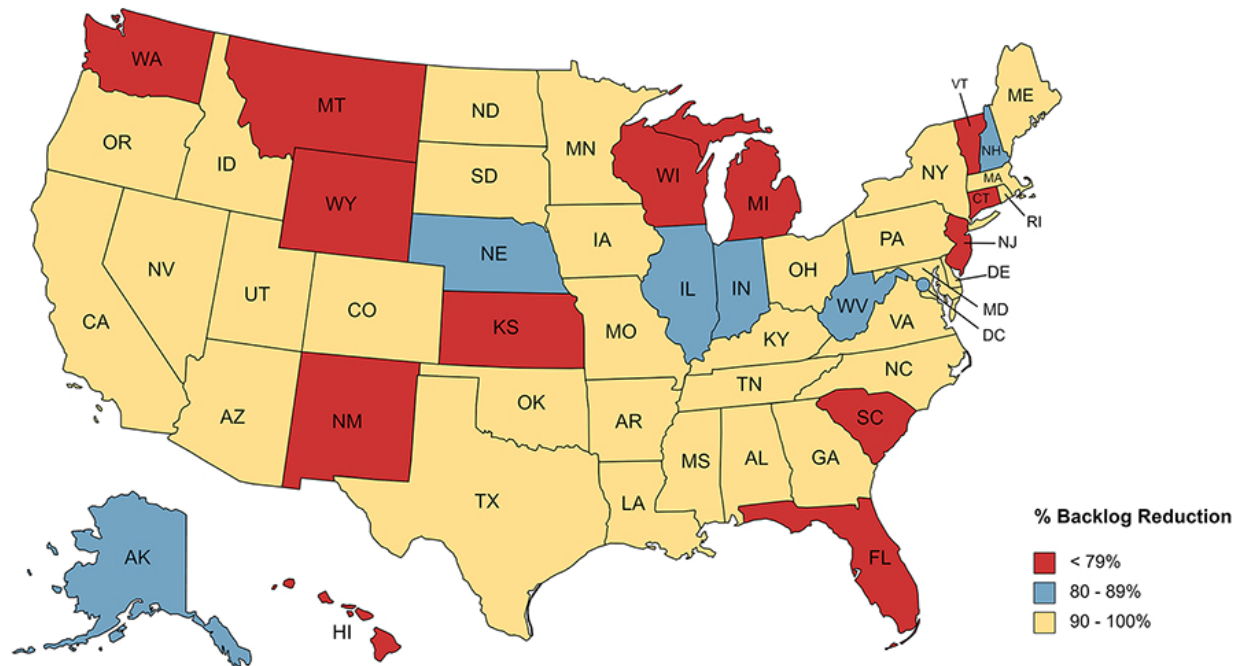
Renewed Emphasis on Closing Releases (2012-Present)

Starting in 2012, the number of closures per year increased on average compared to the decade prior. As the fund balance slowly grew over time, the fund was no longer in debt and could obligate more cleanups in the intermediate term with confidence the resources would be available for reimbursement of costs. In a 2014 report on the Montana fund and DEQ, the EPA further encouraged the state to take steps to increase the pace of cleanup work.

Over the last several years the fund balance has generally increased slowly year-over-year and kept a positive balance, to sit at around \$4 million currently.

While Montana has shown an increase in closures per year over the past decade, the state remains behind in the country in terms of the percentage of known releases cleaned and closed. As the map produced by the EPA in Figure 4 (see page 6) illustrates, Montana is one of just a handful of states that has yet to close 80 percent of its historic releases. When we discussed this map with DEQ management, they noted that Montana's standards to bring a release to closure are stricter than those in many other states, making cleanups in Montana take longer and cost more.

Figure 4

Progress in Closing Underground Storage Tank Releases as of 2020, by State

Source: Reproduced by Legislative Audit Division from U.S. Environmental Protection Agency.

The legislature in recent years has also expressed increased interest in cleaning and bringing more releases to closure and has taken steps suggesting it believes the fund balance is unnecessarily high. According to statute, the tax that replenishes the fund is to be collected until the fund's unobligated balance reaches \$10 million, at which point the fee is no longer assessed. This suggests that in creating the fund, the legislature found a balance of up to \$10 million appropriate for the fund to meet near- and medium-term obligations. Nonetheless, while the fund's unobligated balance has never reached this \$10 million threshold, the legislature has transferred money from the fund in recent years for purposes other than reimbursement of fund-eligible releases. Some of these legislative transfers were related to environmental cleanup and some not. In the November 2017 special session, \$1 million was transferred from the fund (House Bill 6) to put toward wildfire costs accrued that summer. In the 2019 Regular Session, the legislature transferred \$1 million from the fund to DEQ (House Bill 2), which the department is using to address certain release sites that lack the financial resources to move forward.

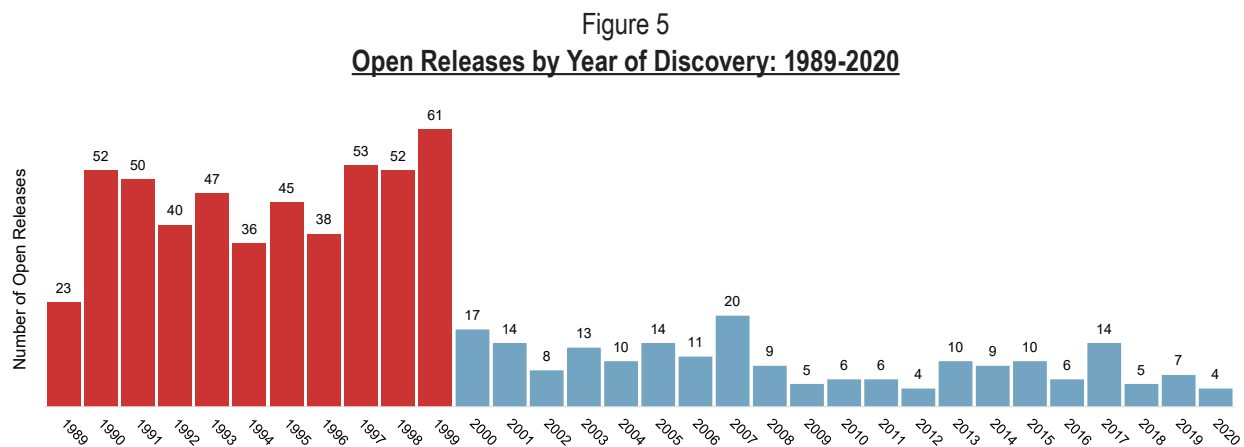
Where Things Stand Today

All told, 4,753 releases from underground storage tanks in Montana have been identified and documented. Of these, 2,287 have applied to the fund for reimbursement eligibility.

As noted above, as of November 2020, there are 706 known open releases that have applied to the fund for reimbursement eligibility, of which 594 are confirmed eligible for fund reimbursement for cleanup. However, there are still historical releases being discovered. According to the department, half of newly discovered releases are from historical contamination from tanks not currently in use.

Of those 706 currently known open releases that have applied to the fund for eligibility, 520, or 74 percent, are 20 years old or older. In most of these cases, these releases are not only eligible for reimbursement, but have met requirements such as their co-pay and have no further obligation on the owner's part up to the \$1 million fund reimbursement limit per release, and in nearly all of these cases the board has obligated funds for the most recent corrective action plans. This suggests the delays in cleaning these historic releases are not due to actions or inactions by the board. The most recent corrective action plan for 67 of these releases was submitted to the department in 2012 or earlier, indicating that work has not progressed on at least a portion of these releases for a decade or more.

The figure below shows the age of open releases, as of December 2020, that have applied to the fund for eligibility based upon the date the releases were discovered. This illustrates the relative age of open releases.



Source: Compiled by Legislative Audit Division from data provided by board staff.

DEQ staff and board staff offered several reasons why a substantial majority of known open releases are 20 years old or more and why work may not have continually progressed. We heard several likely reasons that the majority of known open releases date back two decades or more:

- ◆ Releases may get shelved, the board speculated, as a result of high department case manager workloads or lack of tracking of which releases are assigned to which case managers, particularly when there is turnover in case managers.
- ◆ If a release has been determined to present low risk to human health and the environment, an owner may not want to pursue remediation immediately as it would disrupt business activities. In these instances, the department will not prioritize the release.
- ◆ DEQ case managers are assigned many projects with limited time to expend on oversight of all releases at once. The department suggested that the number of consultants available to do the work also could be a constraint.
- ◆ Many of the “easiest” cleanups have been completed, and the remaining open releases may require more work and more resources.

Without performing additional audit work at DEQ, it is challenging to determine the specific reasons that historic releases are the slowest to bring to closure. While this audit focused on the activities of the

board and its staff, many of the apparent reasons why releases remain open or do not progress toward closure at a faster rate appear to be outside of the board's control.

Regardless, it is clear from recent moves by the legislature and pressure from the EPA that there is interest in increasing the rate at which Montana cleans and closes its backlog of historic underground storage tank leaks.

Time Spent to Close Newly Discovered Releases Continues to Decline

Data suggests that releases discovered in recent years are taking less time to close than releases discovered in the first decades of the program. As part of our work, we computed the time it took for a release to be closed from when it was discovered. We then looked at how the median time it took to close a release has changed over time, depending on when the release was discovered.

As Table 1 illustrates, many releases discovered between 1989 and 1996 were closed fairly quickly. This is because in the early years of the fund, many of the releases that were discovered, often in conjunction with tank removal and replacement, were relatively small and simple to clean. Over the next eight years, in addition to the financial difficulties faced by the fund, a higher proportion of releases discovered were larger and more complex. Finally, between 2005 and 2012, the fund regained solid footing, technology improved, and the department improved its focus on closing sites.

While the pace of closures has hastened over the past decade, DEQ officials caution that many of the simpler remediation projects, have been completed, and the remaining open releases are more complicated and may take added time and resources to decontaminate.

It's also important to note that 46 percent of the historical releases still considered "open" by the department have had cleanup work completed and/or are in a lengthy monitoring phase to ensure state standards for contamination are met, prior to formal closure.

It is difficult to know how many historical releases remain undiscovered and what the fund's total future liability is.

Audit Scope

During audit assessment work, we learned that many stakeholders questioned the roles of both the department and the board in the process of identifying leaks and planning for their containment, cleanup, and subsequent site monitoring. We also heard questions regarding the timeliness and efficiency of ongoing cleanup and reimbursement efforts.

The scope of our audit largely focused on the last 10 years of fund activities, although to provide more complete context we reviewed more limited data from the first two decades of the fund's existence as

Table 1
**Median Time to Clean Up a Release
Based Upon Year of Discovery**

| Years | Median Time (in Years) to Close a Release Discovered Within Time Frame |
|-----------|---|
| 1989-1992 | 3.4 |
| 1993-1996 | 3.4 |
| 1997-2000 | 7.1 |
| 2001-2004 | 7.5 |
| 2005-2008 | 4.8 |
| 2009-2012 | 2.5 |

Source: Compiled by Legislative Audit division from data provided by board staff.

well as certain statistics related to releases that have been open a decade or more. Our review of the past decade included information on nearly 2,300 releases where the owner has applied for fund eligibility. We reviewed the minutes for 30 board meetings from 2015 to the present to compile statistics on claims, claim disputes and eligibility decisions, and to review the discussion of other various matters brought before the board.

Audit Objective

Following assessment work, we developed the following objective for our audit:

Are the roles and responsibilities of the Department of Environmental Quality and the Petroleum Tank Release Compensation Board appropriately defined and adhered to by all parties to ensure the timely and cost-effective remediation of petroleum leaks?

Audit Methodologies

During audit fieldwork, we completed the following methodologies:

- ♦ Interviewed all six members of the board at the time fieldwork was conducted (one seat was vacant throughout this time), to learn members' views on the board's processes and effectiveness.
- ♦ Interviewed state fund or private tank insurance representatives in five states and interviewed the regional Environmental Protection Agency office that oversees Montana's work. These conversations revealed other strategies for efficient cleanups as well as potential options for moving to a model that emphasizes private insurance coverage.
- ♦ Conducted multiple interviews with department and board staff and observed multiple public board and internal staff meetings, to learn how board processes work and to observe board and staff in action.
- ♦ Reviewed board meeting minutes from 2015 to the present (30 meetings), compiling data on claims, disputes, and other board matters.
- ♦ Reviewed relevant statute and administrative rules, as well as history of statutory changes related to the fund and the effect of those changes on the remediation process.
- ♦ Reviewed DEQ and fund-maintained release data on nearly 2,300 releases from 1989 through 2020, to analyze business processes and timelines.
- ♦ Reviewed 30 years of fund claim reimbursement and claim adjustment data to understand the board's past and current cost control processes.
- ♦ Reviewed seven years of data on the board's review of corrective action plans, with particular focus on the obligation of funds to set aside funding for future claims.
- ♦ Reviewed the board's current cost control mechanisms and information related to the board's technical and cost review, including documentation of communication between DEQ and the board.

Report Contents

This report includes two additional chapters.

Chapter II examines the current process for reporting, identifying, and developing plans to clean and close a release and the roles played by both DEQ staff and board staff in moving releases through this process. The chapter includes three recommendations, dealing with the timeline for reviewing corrective action plans, the roles of the board and department in the process, and how cleanup jobs are scoped and contracted.

Chapter III discusses the board's statutory role in planning the long-term future of the fund, and whether upon establishing the fund, the legislature intended for it to provide permanent publicly funded assistance for underground storage tank owners. It provides several examples from around the country of states introducing and/or encouraging the use of private insurance by underground storage tank owners as those states diminish their historic backlogs of releases. This chapter includes one recommendation related to planning for the future of the fund to transition to other financial assurance options for USTs, such as private insurance.

Chapter II – Roles, Responsibilities, and the Cleanup Process

Introduction

Our audit objective included a review of the process currently followed upon discovery of a petroleum leak from an underground storage tank, and the role of the Petroleum Tank Release Compensation Board (board) throughout that process.

When an owner of an underground storage tank discovers a leak, the Department of Environmental Quality (DEQ) should be notified within 24 hours. The owner works with DEQ and hires a consultant to develop a corrective action plan to clean up the leak. DEQ reviews and approves the plan. The board also reviews the plan, determines whether the owner is eligible to have cleanup costs reimbursed from the Petroleum Tank Release Cleanup Fund (fund), and determines how much money it is willing to obligate for the proposed corrective action. The board may also decline to reimburse if it believes the corrective action steps are not appropriate for the release. As work is completed, the board reviews claims (receipts) submitted and determines how much should be repaid. When a leak is sufficiently and permanently cleaned, the department deems the release closed.

To learn how the process works, we interviewed department staff and board members and staff; reviewed formal and informal communications between all interested parties; reviewed corrective action plan data and timelines; discussed the board's plan review process, obligation process, and timing; observed meetings of board staff and department staff; and reviewed the board's cost control methods and claim reimbursement data.

Broadly, we found that for most underground petroleum leaks, the process of remediation and reimbursement from the fund works efficiently. Cleanup plans are developed and approved, work completed, claims submitted and reviewed, and reimbursements made in a timely manner. However, we also noted instances where issues with eligibility for fund support, technical details of cleanup plans, claim disputes, and other conflicts arise in the process. These disagreements, often a result of conflicting opinions between the board and DEQ on how to proceed with cleanups, as well as a lack of clarity in assigned technical and fiduciary roles in the process, have a disproportionate effect on slowing the rate of some remediation work. These disputes also spill over into the day-to-day working relationships between the board and its staff, the department, the consulting community that does the remediation work, and the owners of underground storage tanks.

This chapter includes three recommendations, including one to the legislature to more specifically assign responsibilities in the corrective action plan process, and two to the board, related to the timing of its review of corrective action plans and the process by which contracts for cleanup work are authorized.

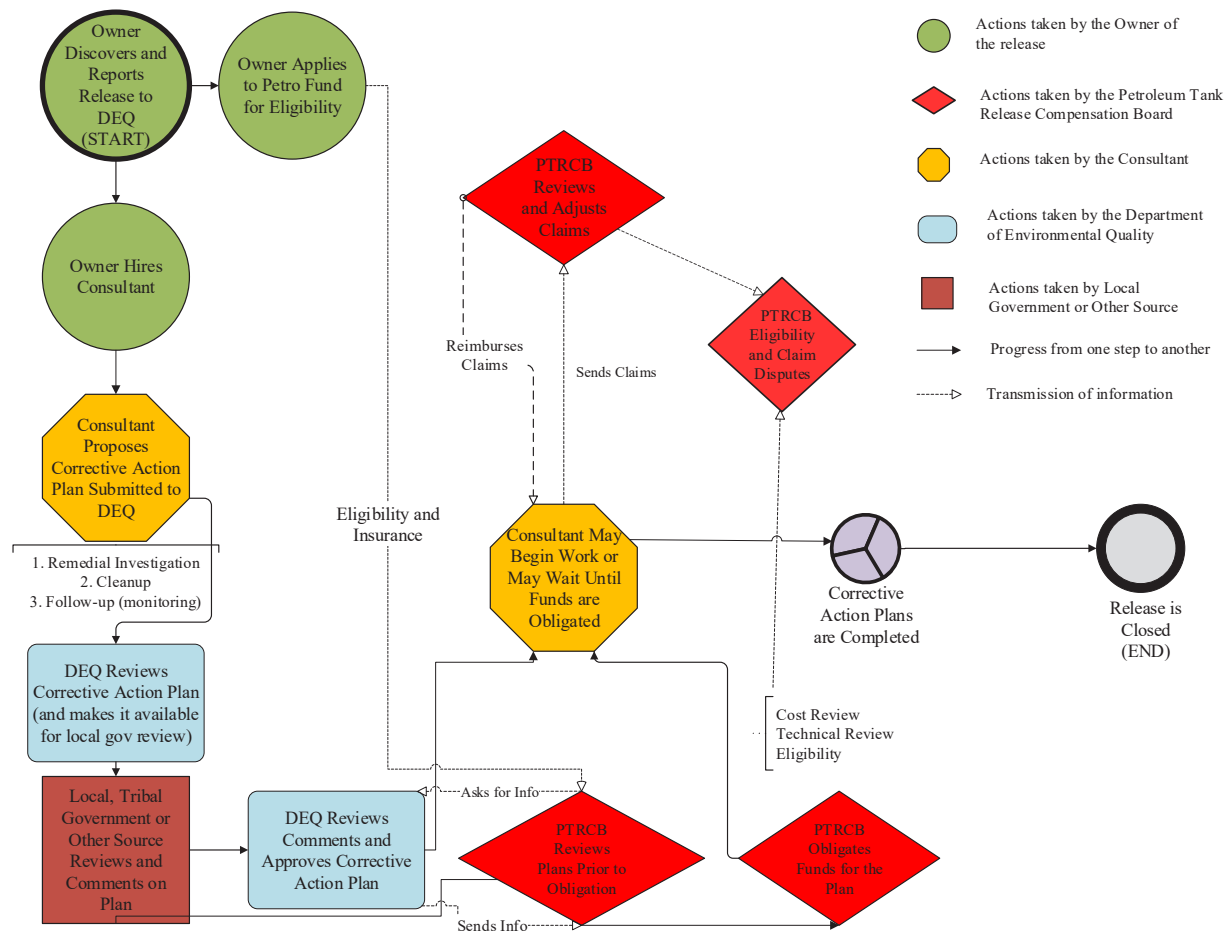
A Winding Road to Cleaning Contamination

The process of bringing a newly discovered release to closure can involve several steps and multiple corrective action plans. Statute defines corrective action as "investigation, monitoring, cleanup, restoration, abatement, removal, and other actions necessary to respond to a release." These steps can

include exploration of the site to determine the scope of the release; actual cleanup work; and a period of follow-up monitoring to ensure effectiveness of the cleanup techniques. Cleanup work can begin before eligibility is determined, but in these instances the owner risks not being reimbursed from the fund for cleanup costs.

Figure 6 illustrates the multiple steps taken upon discovery of an underground petroleum leak to ultimately bring a release to closure. Much of our audit work focused on two steps taken by the board: corrective action plan review prior to obligation, and obligation of funds for the plan.

Figure 6
Current Process to Bring a Release to Closure



Source: Created by Legislative Audit Division from department and board information and interviews.

As the chart shows, there are many steps between reporting a release and the completion of work, several of which involve coordination between multiple parties. After reporting a release to DEQ, the owner of a leaking petroleum tank applies to the fund for eligibility for reimbursement and selects a consultant to perform remediation work. The consultant proposes a corrective action plan to DEQ, which reviews and approves the plan. At this stage in the process DEQ also assigns a prioritization score to each release. The board considers these prioritization scores when determining which projects should be first to have funding obligated.

Once the plan is approved by the department, work may begin. However, there is no guarantee at this point that costs of cleanup will be reimbursed by the board. That is because the board does not review plans to determine the site's eligibility for reimbursement and does not review a project's proposed costs until after the department has approved the plan. Board staff may at times question technical aspects of remediation plans and adjust reimbursement amounts based upon how they believe the work would best be completed. This is in addition to staff's assessment of whether the site is fully or partially eligible for fund reimbursement based upon other statutory criteria detailed in Chapter I.

Board staff's review for eligibility, based strictly on statute, is not the final word. Owners denied eligibility may dispute that decision and be heard by the full board. As part of our work, we reviewed the minutes of 30 board meetings from 2015 through 2020. In that time, the board heard 26 disputes from owners and consultants, the majority of which entailed a challenge to the board's staff recommending one or more releases be deemed ineligible for reimbursement. In 21 of these instances, the board exercised its lawful discretion and went against its staff's recommendation and granted partial or full eligibility or reimbursement. This shows that the board as currently constituted wants projects completed and has a willingness to overlook certain violations by tank owners in order to facilitate cleanups.

As work is completed, consultants submit claims to the board for reimbursement. The board reviews and reimburses claims. Claims may be suspended, or set aside, by the board if the board has not yet obligated funds for reimbursement of the corrective action plan or is awaiting additional information from the consultant regarding the claim. Claims may also be suspended if the facility is in noncompliance.

Releases typically require multiple corrective action plans. The first is frequently a remedial investigation to determine the magnitude and extent of a release. A second plan would typically account for the cleanup itself, and a third plan covers follow-up monitoring of soil and/or groundwater for a period of time to ensure the cleanup was sufficient. The following table illustrates the average cost to the fund of each these three categories of corrective action plans over the last 5 years.

Table 2
Average Cost to Fund Each Category of Corrective Action Plan

| | |
|--|-----------|
| Average Cost of a Corrective Action Plan (CAP) 2016-2020 | \$35,614 |
| Average Remedial Investigation CAP Cost | \$34,144 |
| Average Cleanup CAP Cost | \$123,783 |
| Average Follow-up (Monitoring) CAP Cost | \$15,482 |

Source: Compiled by Legislative Audit Division from fund data.

Current Review Process Adds Additional Complexity and Confusion

During audit work, as we reviewed the corrective action plan review process through interviews with department and board staff and a review of dozens of files and communications, we observed multiple instances of overlapping or redundant review and approval of corrective action plans, as both DEQ and board staff perform some similar functions.

Specifically, under the current process, once a petroleum release is discovered and reported to the department, DEQ works with owners and consultants in developing corrective action plans for remedial investigations, cleanups, and follow-up monitoring work at contaminated sites. Not until after DEQ approves a corrective action plan does board staff review the plan and determine how much they are willing to reimburse, based on established eligibility and reimbursement criteria as detailed in Chapter I.

The board defines its technical review as a review of the remediation techniques and methods in a department-approved corrective action plan. The board bases its reimbursement decisions in part upon whether the board believes the proper cleanup techniques are included in the plan. Eligibility for reimbursement from the fund is based both upon the source and timing of the leak as well as certain requirements of the owner in responding once a leak is discovered. (Under the current process, board staff reviews corrective action plans for both technical details and cost. The board's cost analysis will be discussed later in this chapter.) While the board's technical review most often begins prior to DEQ approval of the corrective action plan, we noted several instances where technical details were questioned and/or changed after the plan was approved. This process is contrary to statutory guidance and may not only slow the process but can also interfere with DEQ's authority to determine when and how a site is to be brought to closure.

According to statute, after an owner submits a corrective action plan to the department for approval, the department is to forward the plan to the local or tribal government (as applicable) as part of the review process and may receive comments on the draft plan from that government entity "or other source," such as the board, prior to approving the plan. However, it is still ultimately up to the department to determine the appropriate approach to site cleanup and to approve the plan.

As statute reads currently, the board would be considered an "other source" with an opportunity to comment on draft plans prior to department approval. Once a plan is approved by the department, however, the local government explicitly may not mandate different cleanup requirements on the owner. Statute does not address the role of any "other source" in reviewing or commenting on corrective action plans following approval by the department.

Any Board Review Should Occur Prior to Department Approval

We asked board staff why they do not participate in corrective action plan review while the plans are being developed and before final DEQ approval. Board staff told us they do not want to review corrective action plans prior to department approval of the plans, because in the minority of instances in which a plan is ultimately not approved by the department, the board staff would have "wasted time" with its review.

However, having board review take place following department approval of a corrective action plan, as is currently the practice, can be confusing for owners and can delay the beginning of remediation work. As the process currently works, approval of a corrective action plan by DEQ and notification to the owner of that approval is not an indication of reimbursement from the fund and in fact may not even be a final plan regarding how the contamination should be cleaned, due to the board's technical review. Moving the board's review of corrective action plans to earlier in the process would encourage collaboration between the department and the board and help present a unified message to tank owners about their corrective action plans and their prospects for reimbursement.

In our audit work, we noted instances of board staff asking the department for additional technical details about approved corrective action plans, regarding things like the geology or ground water flow at a site; how and why the department came to recommend certain remediation techniques; questioning the number of monitoring wells approved by the department; whether the appropriate amount of soil is being excavated; and other technical details related to plans already reviewed and approved by the environmental regulatory agency.

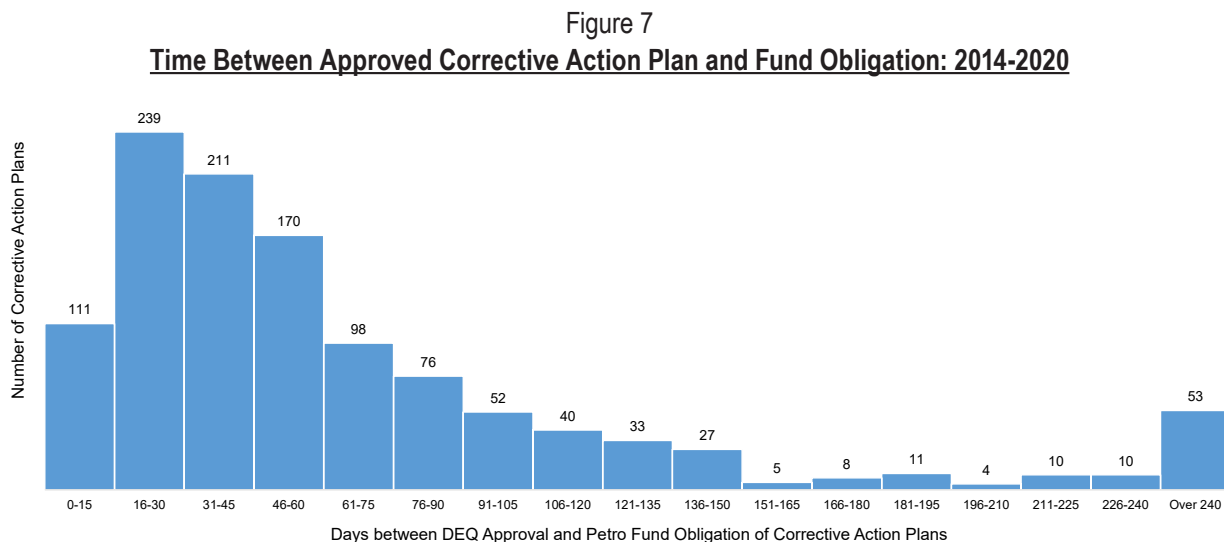
After the board conducts its technical review of a corrective action plan and determines sufficient funds are available to reimburse cleanup costs, it sends an obligation letter to the owner, indicating the amount of reimbursement that will be available upon completion of the project. It is only upon receipt of this letter that owners and their contracted consultants can be assured of reimbursement if the plan is followed, even though they have been previously notified by DEQ that the corrective action plan was approved by the department. Through audit work, we learned that consultants may be hesitant to begin work on a department-approved corrective action plan because they have not yet been assured of reimbursement by the board.

Most Funds Obligated Within Two Months of Corrective Action Plan Approval

The board appropriately obligates funds with an eye toward future cash flow and resource availability as projects are anticipated to be completed and claimed, in order to assure the fund will have sufficient resources to reimburse projects in a timely manner as work is completed. Board staff meets monthly to review pending projects and the priority rankings of those projects and decides which ones have passed eligibility review and are ready to be obligated. Obligation letters are sent soon after these monthly meetings, although the exact date of obligation and the timing of the subsequent letter is not something the board tracks specifically.

Our analysis of 1,158 corrective action plans that generated obligation letters from 2014 to 2020 showed that the annual median time for board review between DEQ approval and obligation of a corrective action plan ranged from 38 to 60 days. This can delay the onset of remediation work as not all consultants will begin work until they have been guaranteed funding.

The following figure illustrates the length of time it takes the board to obligate funds once a corrective action plan is approved by the department.



Source: Compiled by Legislative Audit Division from fund data.

The horizontal axis is split into 15-day increments. For example, there are 111 corrective action plans for which funding for the work was obligated by the fund, via an obligation letter sent to the owner, within 15 days after DEQ approved the plan. There were 239 corrective action plans for which the board sent out an obligation letter between 16 and 30 days after DEQ approved the plan.

While most corrective action plans (72 percent) are reviewed and obligated by the board within two months of department approval, over the last seven years, 53 work plans (5 percent) took more than eight months to obligate. Extended obligation times are most often the result of the board awaiting additional information from DEQ or the owner/consultant in order to determine the amount of funding that should be obligated. These items may include information related to eligibility, including the source and nature of the release, among other criteria; determining whether the owner has private insurance and making sure private insurance is used before accessing the fund; ensuring the corrective action plan requires only eligible activities or determining which parts of the plan are statutorily eligible for reimbursement; or questioning the technical aspects of the activities in the department-approved corrective action plan.

Collaboration Would Make Process More Efficient

All of these steps currently undertaken by the board could be done more efficiently while the corrective action plan is being developed and reviewed by the department. Importantly, this may also entail the department working more collaboratively with the owner and consultant to collect information regarding the circumstances of site eligibility, so the board will have all the information it needs to review a plan for reimbursement.

Working closely and collaboratively with DEQ and the owner/operator upfront before a plan is approved could help the board obtain this information required for determination of reimbursement

amounts more expediently and establish a budget that is approved at the same time as the corrective action plan. Establishing a budgeted amount upfront would also eliminate this time between approval and obligation, allowing work to immediately commence after a plan is approved by DEQ. As noted, state law indicates that prior to DEQ approval is the appropriate time for the other parties such as the board to review corrective action plans.

RECOMMENDATION #1

We recommend the Petroleum Tank Release Compensation Board work with Department of Environmental Quality to collaborate during corrective action plan development to verify eligibility, assure fund availability, and provide any other relevant input for consideration prior to final plan approval by the department.

Lack of Clarity in Authority to Determine Scope and Methods of Cleanup Work

As noted above, under the current process, the board waits until the department has approved a corrective action plan and only then reviews the plan both for cost and for technical details of how a petroleum leak is to be remediated.

Our observations of the current corrective action plan review process indicated the technical aspect of the board's review is at times duplicative, given that the department—which is the regulatory agency charged with protecting public health and the environment, and as such is the entity charged with determining when a site is cleaned to state standards and can be deemed “closed”—has already reviewed and approved the technical aspects of each corrective action plan that the board then reviews. As noted in the previous section, statute suggests that prior to plan approval would be an appropriate time for the board to comment on technical aspects of a proposed corrective action.

During audit work we also heard questions about what the appropriate role of the board is in reviewing corrective action plans, and whether it is appropriate for the board to offer opinions or withhold funding based upon how approved remediation work is to be conducted.

Attorney General Opinion Supported Department's Authority to Determine Cleanup Methods

Shortly after the formation of the fund and the board 30-plus years ago, similar questions arose about the proper roles of the board and the Department of Health and Environmental Sciences (the predecessor of the Department of Environmental Quality) in facilitating cleanups. An administrative rule was put in place mandating that tank owners secure board approval for cleanup plans in addition to department approval, if they wanted reimbursement from the fund.

In 1992, at the request of the department director, the attorney general issued an opinion on that rule and on the appropriate roles of both the department and the staff in determining proper steps to take to clean up a petroleum leak. The attorney general said:

- ♦ The board does not have the statutory authority to modify the technological methodologies or requirements of corrective action plans approved by the department, and
- ♦ The board does not have the discretion to deny claims for reimbursement from the fund for expenses “actually, necessarily, and reasonably” incurred in preparing or implementing a corrective action plan approved by the department.

In elaborating on his opinion, the attorney general noted that “the selection of a choice of technology and method for achieving remediation of a release are established by the department’s review and approval of a corrective action plan.” The board, though, “does have discretion in reviewing the reasonableness of a claim submitted for reimbursement.”

An attorney general’s opinion carries the weight of law unless and until statute is changed to counter or otherwise call into question the opinion. Such was the case with a pair of changes to state law in the decades following the issuance of the 1992 opinion, with the result being less clarity and more ambiguity regarding the roles of the board and the department in determining the appropriate technical methods to clean up a contaminated site.

Statutory Amendments Created Ambiguity About the Board’s Role

Each of the two amendments in question included the phrase “actual, reasonable, and necessary” in assigning authority to the board to determine reimbursement eligibility. However, nowhere in statute are those three terms defined to provide guidance for the board in weighing its responsibilities in determining eligibility and reimbursement.

In particular, the lack of a definition of “necessary” is problematic. Because DEQ is the regulatory agency charged with protecting human health and the environment and is responsible for determining when a site is cleaned to state standards, it is reasonable to take as “necessary” any remediation techniques that are included in a department-approved corrective action plan. The two amendments were related to the board’s assessment of cleanup costs and the board’s review of claims for completed work and are discussed in more detail below.

One Amendment Included in Bill About Different Source of Cleanup Funding

Amended in 2015, §75-11-307(1)(j), MCA, excludes from reimbursement “costs that the board has determined are not actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan.” The board has relied on this statute to justify its questioning of certain remediation techniques or other elements of department-approved plans. The board does not believe that a cleanup technique in a department-approved plan is automatically “necessary” by definition, and that it is the purview of the board to determine what steps are “necessary” to respond to a release. However, the board’s role is fiduciary and not technical in nature.

Further muddying the picture is the fact that this statutory amendment was included in a bill that dealt with Brownfield funding, a federal source of remediation funding completely distinct from the fund and a source of funding over which the board has no authority. It's unclear whether this amendment was intended to be directed at the board's activities, given the title and contents of the bill in which it was included.

Another Amendment Addressed Claim Reimbursement Process

The second statutory amendment discusses the board's reimbursement procedures in §7-11-309(1)(h) (2), MCA. This section mandates that the board "shall review each claim and determine if the claims are actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan." This section of statute deals with claims being filed after work is completed. In this context, it is reasonable to believe that any claim deemed "necessary" would be a claim for a task in the department-approved corrective action plan.

Board Has Never Used Existing Statutory Mechanism for Plan Review

Statute does provide an avenue for the board to challenge a corrective action plan it believes does not make efficient use of the fund. The board may by law request a third-party review of a corrective action plan. If this review suggests a corrective action plan is not appropriate, the board may send the plan back to the department for further review. However, in the 18 years since this statute was enacted, the board has never commissioned a third-party review of a corrective action plan.

DEQ Is the Entity Responsible for Determining Site Closure

Despite these statutory amendments that have made the role of the board less clear, DEQ is both responsible for assuring contaminated sites are remediated to meet state standards for soil and groundwater, and DEQ is responsible for determining when a contaminated site can be deemed closed. Because these responsibilities rest with the department and not the board and because DEQ is the regulatory authority and possesses the technical expertise needed to develop appropriate corrective action plans, these corrective action plans should not be subject to technical review and approval by the board.

The roles of the regulatory authority and fund managers should be complementary and not duplicative. The former should be responsible for the technical aspects of bringing a release to closure, and the latter should be responsible for confirming eligibility and reimbursing claims in a timely manner. As noted in the previous section, statute allows for the board to comment on corrective action plans under development, but the ultimate arbiter of how to proceed with a remediation should be the department. The board should not deny or withhold guarantee of reimbursement on the basis of not agreeing with technical aspects of a plan. Once a plan is approved by the department, any remediation steps included in the plan should be considered "necessary" by the board for purposes of reimbursing costs.

Board Sometimes Questions Cleanup Techniques

As part of our work, we identified 13 different releases that included correspondence between DEQ and the board where board staff questioned technical methodologies used within corrective action plans the department had already approved. We found that in some cases the board did not obligate funds for a plan until such questions were resolved. DEQ has at times expended staff resources answering technical

questions from the board about plans the department has already approved. There have also been cases where DEQ has changed or requested new plans from consultants as a result of the board's technical review and refusal to obligate funds, which has led to delays in the start of remediation work for several releases.

For example, a corrective action plan was approved by the department for a release in November 2013. Based on our review, the board questioned the method proposed to remediate the site, after the department had already conducted a remedial alternatives analysis, and the board did not obligate funds for the original corrective action plan as approved by the department. As a result, the department and consultant put forth new plans to examine other approaches to remediating the release. As of March 26, 2021, remediation activity had not yet begun on the release.

The blurring of the lines between these two parties over time has resulted in slower approval of work, mixed messaging to owners/operators from state officials, and redundant staff time and resources as corrective action plans are subject to multiple reviews and approvals.

DEQ Should Determine What Is “Necessary” to Close a Site

As the state regulatory authority charged with protecting public health and the environment, it is the role of DEQ to determine how to best clean up a contaminated site. The agency performs this function for contaminated sites of all types, and there is nothing unique about petroleum leaks that would usurp the agency's authority.

The board retains an important role in the process, that of the fund's fiduciary. While it is not the role of the board to determine specific cleanup techniques, the board is responsible for the fund's ongoing solvency. It must not only ensure funds are spent solely on eligible releases but also that resources are obligated in a consistent manner to facilitate steady progress while also retaining funds for emergency/high-priority releases.

Based on our review, we believe the Legislature needs to clarify the roles of the department and the board regarding which party determines what remediation actions are necessary to close a site. The legislature is uniquely positioned to clarify the appropriate roles of the department and the board in developing, approving, implementing, and reimbursing corrective action plans. Defining as “necessary” any corrective action measures included in a department-approved corrective action plan would lend clarity and certainty to the process for all interested parties.

RECOMMENDATION #2

We recommend the Montana Legislature clarify statute by making amendments as needed to clarify the Petroleum Tank Release Compensation Board does not have a role in approving or basing reimbursement on the specific methods prescribed within approved corrective action plans that bring an eligible petroleum release to closure.

Board Expends Significant Resources on Current Cost Review Process

Because owners and operators may hire a consultant with no consideration of cost, in contrast to a bid process, the board implements its own cost control measures throughout the cleanup process after a consultant is selected. Currently, these cost control methods are employed after a corrective action plan has been approved by the department. This creates numerous additional administrative review steps that require board staff time and can slow the cleanup process.

One of the primary cost controls used by the board involves the calculation of maximum allowable rates for common labor and equipment codes as well as for standard corrective action tasks and progress reports. These rates are reviewed and adjusted annually, with input from the consulting community. The board sets these rates by taking an average of sample rates gathered from a pool of consultants for a particular activity and accounting for some variation in the rates that consultants submit. For example, in 2016, the maximum allowable rate for the standard ground water monitoring task established by the board was \$156. If a consultant submitted an invoice for standard ground water monitoring corrective action plan of \$160, the board would adjust the claim downward by \$4 and reimburse the consultant for \$156, the maximum allowable rate.

The board applies cost controls, including maximum allowable rates, at two separate points in its business process:

1. Before obligating funds: The board reviews corrective action plans after DEQ approval and before obligating or setting aside funding for the work. Based on its allowable costs, the board may obligate less than the budgeted amount of the DEQ-approved plan.
2. After a task is complete: As work is completed, the board reviews and adjusts individual claims submitted by consultants that are associated with the itemized activities within a plan.

Application of Cost Controls Requires Significant Staff Time

Because the department's approved corrective action plan includes a preliminary budget but not an approved cost component, board staff conduct a cost review of the plan after it has already been reviewed and approved by DEQ and prior to obligating funds. During this cost review, board staff examine each of the budget items within an approved work plan and will reduce costs for items that exceed annual maximum allowable rates or are not allowed. The board also makes sure that if a consultant subcontracts for activities costing more than \$2,500, that the consultant obtains three competitive bids. Then the board sends out an obligation letter to the owner and consultant, informing them of the amount the board is willing to reimburse, net of any reductions to the proposed budgeted amount in the approved plan. According to the board, staff spend most of their time reviewing corrective action plans and applying cost controls, namely maximum allowable rates and allowable costs, to items within plan budgets, an activity that would be largely eliminated if the budget for the plan was determined through an upfront bid process.

Application of Cost Controls Following DEQ Approval Can Create Confusion, Delay the Start of Remediation Work

We requested, reviewed, and discussed with the board examples of when board cost review led to cost savings to the fund as a result of changing the work conducted by a consultant. We also noted examples

where the board's corrective action plan review resulted in delays in the start of remediation work. We compared the examples we received with corrective action plan data obtained from the board to ensure consistency of information provided.

We found that board staff applying cost controls and denying reimbursement for part of a plan after DEQ approval can create confusion and frustration among owners and the consultants they hire and may cause further delay in a consultant beginning work after the board has notified the consultant of a partial obligation.

For instance, the department approved a work plan in November 2014, which included excavation by a subcontractor as a method proposed to remediate the site. The board's cost review determined that the consultant had not submitted three bids to the board for the excavation as the rules require, and fund staff identified another subcontractor who would be willing to do the work at less than half of the cost. As a result, the plan's budget was reduced by \$95,000. The board partially obligated the work plan, at the reduced amount, in March 2016. According to the board, the excavation portion of the original plan still has not been undertaken. Had the project been competitively bid up front, the consultant with the winning bid would have agreed to do the job at a lower cost from the beginning, likely resulting in work starting sooner while still achieving the cost savings. Thus, determining the cost component of the work plan through a competitive bid process before it is approved by DEQ could help eliminate such delays.

Cost Controls Result in Additional Time Reviewing Claims, Processing Documentation

As part of our audit work, we also examined the board's claim review process. This involved us interviewing board staff and analyzing claim reimbursement data from 1990 - 2020 received from the board.

We found that because there is not an upfront cost control mechanism, such as a competitive bid process, that establishes the amount to be reimbursed before a corrective action plan is approved by DEQ, board staff must apply additional cost controls and adjust individual claims submitted by consultants as part of the claim review process. The following table summarizes the claim data we reviewed.

Table 3
Summary of the Claims Processed by Board Staff Between 2016 and 2020

| | |
|---|--|
| Number of claims received by board staff | 3,681 (from 527 Corrective Action Plans) |
| Number of claims that board staff adjusted | 1,939 (53%) |
| Number of claims staff credited back adjustments to consultants | 121 |
| Number of claims that were suspended | 1,238 (34%) |

Source: Compiled by LAD staff from data reviewed during fieldwork.

Board staff review and adjust a significant number of claims. Based on our review of board staff's comments recorded for each adjustment they made, the majority of adjustments came from the comparison of invoiced costs against maximum allowable rates for particular tasks and from ensuring that costs are allowable for reimbursement under other administrative rules, both of which would be largely unnecessary with a competitive bid process. This would result in less time reviewing claims and reduce the number of adjustments made. Board staff also discussed how a bid process could reduce the number of claims received by a consultant.

After an adjustment is made by the board, the consultant may submit additional information explaining why they believe the full amount of the claim should be reimbursed. This creates additional work for staff as they review this information to determine whether the claim warrants full reimbursement. From the claims received between 2016 and 2020, staff credited at least a portion of the adjustment back to the consultant 121 times after receipt of additional documentation justifying costs included in the invoice that were not fully reimbursed at first.

About one third of claims are suspended by board staff or are set aside without payment while board staff await additional information often from the owner or consultant, including information that refutes an adjustment staff made to a claim, causing delays in reimbursement and an extra step in the claim review process.

Cost Controls Lead to Claim Disputes, Costing the Fund Time and Resources

Lastly, claim disputes can take up an inordinate amount of time and resources at board meetings relative to the size of the claims being disputed. If board staff denies a claim, the owner and/or consultant may dispute that denial in a hearing before the full board. In one extreme example, we noted a board meeting contained a lengthy discussion of a claim for \$183 that staff had denied because staff believed monitoring wells at a cleanup site were wrongly located. After substantial conversation, the board overturned staff's recommendation and voted to reimburse the \$183.

Since a bid process would reduce the number of adjustments made to claims, and the consultant who wins the bid agrees to the cost before they begin work, the number of claim disputes would decrease.

The current cost control process requires the board to review and apply cost controls to multiple individual claims for each corrective action plan. This includes comparing invoiced costs against maximum allowable rates for specific tasks and making sure that costs are allowable for reimbursement. Claim review and adjustment consumes staff time and resources that could be allocated elsewhere. Similarly, claim suspensions and the need to communicate with consultants and owners to resolve disagreements over the amount reimbursed for individual claims represent added costs to the fund. While claim review, claim suspension, claim disputes, and other communication with consultants regarding claims may never be fully eliminated, an alternative approach to establishing the cost component of a corrective action plan when the plan is approved by DEQ, such as through a competitive bid process, could simplify the process and reduce staff time and other resources expended on reimbursement of claims.

A Competitive Bid Process Could Produce Additional Cost Savings to the Fund

The application of cost controls results in clear savings to the fund. Using claim adjustment data obtained from the board, we calculated the total value of adjustments made by board staff or reductions to claims submitted by consultants from 2016 to 2020. We then calculated that the average annual amount of cost savings due to claim adjustments during this time period was \$571,292. We believe, but cannot quantify, the fund may realize cost savings beyond this total, due to additional cost adjustment early in the process as well as consultants potentially withholding claims they know will not be paid in full.

While the board's current cost control efforts result in significant savings to the fund, the behaviors that a competitive bid process incentivizes can make it a superior cost control mechanism compared to setting maximum allowable rates, the board's current primary cost control mechanism. This is because with a competitive bid process:

- ◆ Consultants have incentive to reduce their costs (and by extension, the amount of work needed) to as little as possible while still completing the job, in order to submit the lowest bid possible and increase their chances of winning the contract.
- ◆ The available, capable bidder with the lowest bid wins the project.

The board's current cost control process, including the use of maximum allowable rates, does not provide for either of the two statements above. Some observations from how the process is currently structured:

- ◆ The owner may hire any consultant, not necessarily the consultant that can satisfactorily complete a corrective action plan at the lowest cost.
- ◆ As one of its primary cost control mechanisms, the board sets a maximum allowable rate for a given task or labor/equipment rate code. Once an annual maximum allowable rate is established for a certain task or code, if a consultant submits a cost that is above the maximum allowable rate, the consultant's claim will be adjusted down to the maximum allowable rate and will be reimbursed for this amount.

Under the current cost controls, the consultants can submit any rate they want without any negative consequence of submitting high rates such as losing a bid to a competing consultant. Moreover, the consultant who can perform the job at a given quality for the lowest cost is not necessarily selected to begin with, because the owner may hire any consultant without regard for who can do the job the cheapest. Consultants can submit a rate at a value for a given task that is higher than they might submit if the project were being competitively bid.

Competitive Bidding Should Lower Costs

By basing its reimbursement rates around an average of consultant costs for specific tasks, the board is introducing cost-certainty, but not at the lowest possible cost to the fund or taxpayer. This is because an average of consultant costs for a specific task is going to land at a rate higher than the lowest consultant cost included in the average. Conversely, the lowest consultant cost included in the average would represent the low bid for that particular task.

The maximum allowable rate method currently used by the board to control costs allows for reimbursement of any rate up to the maximum allowable rate. We know the minimum rate that would be claimed for a given activity would be the rate of the lowest bidder, or the rate of the consultant who would be willing to perform the activity at the lowest cost. Any time a consultant submits a claim for more than the rate of the lowest bidder, the difference represents lost cost savings to the fund. Therefore, any particular task, such as ground water monitoring, would produce more cost savings if that task were competitively bid.

The following table provides a simple example of how competitive bidding can produce additional cost savings to the fund relative to the use of maximum allowable rates.

Table 4
Competitive Bidding Versus Maximum Allowable Rate Method Example

| Consultant | Invoiced Cost to Complete Task | Sample Average | Sample Standard Deviation | Maximum Allowable Rate | Competitive Bidding Cost to the Fund | Maximum Allowable Rate Costs | Additional Costs to the Fund under Maximum Allowable Rates |
|------------|--------------------------------|----------------|---------------------------|------------------------|--------------------------------------|------------------------------|--|
| A | \$155 | \$165 | \$13 | \$178 | \$155 | \$155 | \$0 |
| B | \$160 | | | | | \$160 | \$5 |
| C | \$180 | | | | | \$178 | \$23 |

Source: Compiled by Legislative Audit Division staff from board data.

Suppose consultants A, B, and C make up the sample used by the board to compute an average cost for a task. As defined in administrative rule, the maximum allowable rate for a given task is equal to the sample average plus the sample standard deviation. If the project were competitively bid, Consultant A would win the bid since they can complete the task at the lowest cost of \$155. Under the maximum allowable rates method, the fund could pay up to \$178, depending on which of the three consultants the owner chooses.

Finally, we examined rates submitted by consultants for standard work plan activities for which the board publishes rates and compared these to the board's published rates. We observed evidence of consultants submitting claims based off of published maximum allowable amounts rather than what they would normally charge for an activity. This is likely evidence of additional costs to the fund compared to if rates were not published, since consultants who would normally submit rates lower than the published amount can simply submit the published amount and still be reimbursed for it. This inefficiency would be eliminated if the corrective action plan were bid competitively, or if maximum allowable amounts were not published by the board. For the last several years the board has published rates for a variety of specific cleanup tasks. Over these years we observed that consultants submitted invoices charging the maximum allowable rate at a disproportionately high frequency. In contrast, prior to the 2009 establishment and publication of maximum allowable rates for standard corrective action tasks, the range of costs submitted by consultants for specific tasks was more evenly distributed.

Knowing the maximum rate allowed presents an opportunity for consultants to submit rates that are higher than they normally might submit under competitive bid conditions or if rates were not published, and therefore can lead to increased costs to the fund.

Table 5 provides an example of how consultants submitted invoices equal to the maximum allowable rate at significantly higher frequency in the years after the board began publishing the maximum allowable rates for given tasks.

Table 5
Frequency of Claims for Maximum Allowable Rate

| Standard Task: Ground Water Monitoring | | | | | |
|--|----------------------------------|--|-----------------------------|----------------------------|------------------------|
| Year | Amount Most Frequently Requested | Number of Submissions for Requested Amount | Total Number of Submissions | Percent of All Submissions | Maximum Allowable Rate |
| 2005 | \$130 | 20 | 258 | 8% | N/A |
| 2006 | \$150 | 33 | 259 | 13% | N/A |
| 2007 | \$150 | 35 | 152 | 23% | N/A |
| 2008 | \$150 | 21 | 92 | 23% | N/A |
| Petro Fund Begins Computing Maximum Allowable Rates for Standard Tasks in 2009 | | | | | |
| 2009 | \$150 | 26 | 122 | 21% | \$150 |
| Petro Fund Begins Publishing Rates for This Task in 2010 | | | | | |
| 2010 | \$150 | 31 | 95 | 33% | \$150 |
| 2011 | \$156 | 36 | 106 | 34% | \$156 |
| 2012 | \$156 | 107 | 199 | 54% | \$156 |
| 2013 | \$159 | 106 | 171 | 62% | \$159 |
| 2014 | \$170 | 111 | 166 | 67% | \$170 |
| 2015 | \$172 | 65 | 131 | 50% | \$172 |
| 2016 | \$175 | 66 | 105 | 63% | \$175 |
| 2017 | \$180 | 96 | 158 | 61% | \$180 |
| 2018 | \$182 | 53 | 103 | 51% | \$182 |
| 2019 | \$186 | 65 | 112 | 58% | \$186 |

Source: Compiled by Legislative Audit Division staff from board data.

The second column shows the invoiced amount that consultants submitted to the board for reimbursement with the highest frequency in a given year. The fifth column provides the percent of all invoices received that were for the requested amount with the highest frequency. For example, in 2005, \$130 was the invoiced amount most commonly submitted by consultants for standard groundwater monitoring. Invoices for \$130 accounted for 8 percent (20 out of 258) submissions in 2005.

The last column shows the maximum allowable rate. The board began computing maximum allowable rates in 2009 and publishing them in 2010. Since that time, the most frequent amount claimed has always equaled the maximum allowable rate. In 2010, 33 percent of invoices received from consultants for ground water monitoring requested reimbursement at the maximum allowable rate, which is a 12 percent increase from 2009, when rates were not published. From 2012 on, the number of invoices claiming the published maximum allowable rate varied between 50 and 67 percent of all invoiced amounts received by the board. In yellow we highlight the disproportionate number of total submissions that are at the maximum allowable rate following the publication of maximum allowable rates in 2010.

It is possible that a consultant who could complete one task in a corrective action plan at the lowest cost may not be able to complete other tasks in the same plan at the lowest costs. In these cases, there is no guarantee that competitive bidding will be more efficient than the current cost control process. However, competitive bidding would in most cases remain more efficient because in the cases where other consultants could do the work more cheaply, a consultant would have incentive to subcontract to those who could do those activities at the lowest cost in order to submit the lowest overall bid for a corrective action plan containing multiple activities.

State Routinely Solicits Bids for Contracted Projects, in DEQ and Other Agencies

Across Montana state government, agencies frequently use a competitive bid process to ensure contracts are awarded in a fair and transparent manner that benefits both the bidding firms and the taxpayer. The State Procurement Bureau at the Department of Administration “strives for transparent, cost-effective contracts that ensure the state receives the maximum value for taxpayers’ dollars.” This is often achieved through competitive bidding.

The Montana Procurement Act requires a source selection method for state agencies that typically involves a formal procurement process. DEQ typically uses a limited solicitation procedure or a sealed competitive bid process as its primary cost control mechanisms when contracting cleanup work in areas other than underground storage tanks. Administrative rule allows for limited solicitations for contracts under \$25,000 and requires a more thorough sealed competitive bid process for contracts over that amount.

The board already requires competitive bidding as a means of cost control for certain activities within corrective action plans. For example, the board requires that consultants who are subcontracting a task with an estimated cost above \$2,500 obtain three competitive bids for that task.

Competitive Bidding Would Save Staff Time, Make Remediation Efficient

In addition to reducing administrative activities associated with the board’s current cost control process, a competitive bidding process can lead to additional cost savings for the fund over current cost control methods by ensuring that the consultant who can perform the work at the lowest cost gets the bid and incentivizing consultants to submit lower bids or rates of reimbursement for activities in order to win the job.

We discussed the concept of competitive bidding in multiple interviews with board and department staff. While open to the idea, they identified a number of areas to address as this change in process is contemplated. Some considerations that arose included:

- ♦ The potential need for statutory change in order to accommodate a new bidding process for fund-eligible projects.
- ♦ Reallocation of resources to manage a new bidding process, once it is determined who will manage the process.
- ♦ The program has historically been designed to allow owners to choose the consultant, and the state procurement process may not be compatible with this framework.
- ♦ The pool of qualified consultants in Montana may be smaller than would be desired, and it may be challenging to obtain a sufficient number of bids for certain corrective action plans.
- ♦ Circumstances such as availability and qualifications may lead DEQ to hire a consultant who did not submit the lowest bid for a certain plan.
- ♦ Potential exemptions for emergency response.

Ultimately, using a competitive bid process for fund-eligible jobs would save hours of staff time in developing and implementing cost control measures for individual tasks as well as the itemized review of individual claims as work is completed. In a competitive bidding environment, owner/operators of underground storage tanks would not necessarily have their work done by their choice of consultant, if they were intent upon reimbursement from the fund. However, accessing the public treasury to clean spills on private property should come with the public expectation that the work will be done as efficiently and effectively as possible, and a competitive bid process would ensure just that. Owners are free to hire their preferred consultants provided they are willing to pay for the cleanup themselves.

RECOMMENDATION #3

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to develop a process, seeking legislation if necessary, whereby remediation projects are competitively bid to bring releases to closure, in accordance with existing state procurement laws.

Chapter III – The Future of the Fund

Introduction

In addition to its role in determining eligibility of releases for expense reimbursement and determining when funds are available to be set aside for cleanup projects, the Petroleum Tank Release Compensation Board (board) has a statutory role in planning for the future of the fund. The board is tasked with considering the near-term outlook as work is completed and funds must be appropriately budgeted and obligated and further into the future when Montana's backlog of historic releases is closer to completion. Our audit work included a review of how the board fulfills this forward-looking role and whether there are opportunities for more thorough planning for the future. The board can plan for a time when the state's backlog of historic releases is all cleaned up, but the board can also explore other options and models for insuring underground storage tanks for unintentional releases.

When the Petroleum Tank Release Cleanup Fund (fund) was created by the legislature in 1989, the accompanying statement of legislative intent said: "current administrative and financial resources of the public and private sectors are inadequate to address problems caused by releases from petroleum storage tanks and need to be *supplemented* by a major program of release detection and corrective action (emphasis added)." The statement further says that a purpose of the fund is to "assist *certain* tank owners and operators in meeting financial assurance requirements under state and federal law (emphasis added)." Labeling the fund as "supplemental" and providing it to assist "certain" tank owners indicates that the legislature did not intend for the fund to be a permanent, universal, public insurance fund to be drawn on in perpetuity by the all owners of underground storage tanks.

This chapter discusses the board's responsibility to plan for the future of underground storage tank leak remediation in Montana and reviews steps a number of other states have taken to move away from a purely public model of financial responsibility for cleaning up leaks. It includes one recommendation to the board related to seeking legislation that prepares the fund to transition to other options of financial assurance for USTs, such as private insurance.

Law Requires Biennial Reporting

State law requires the board to provide a report to the legislature and the legislative auditor on July 1 of every even-numbered year, or six months prior to the start of each regular legislative session. As part of reporting, the law requires the board to conduct an analysis of the short-term and long-term viability of the fund. This report "must include but is not limited to:"

- a. Trends in fund revenue and expenditure activity;
- b. Exposure to long-term liabilities;
- c. Impacts of changes in state and federal regulations relating to underground and aboveground storage tanks;
- d. Availability of petroleum storage tank liability insurance in the private sector and trends in provisions of the insurance; and
- e. The continuing need for collection of all or part of the petroleum tank release cleanup fee.

While many of the required elements of the report examine the current health of the fund, the board is also required to review and report on the availability of private insurance, and whether the collection of the \$0.0075/gallon fee that supports the fund is still necessary.

Board Reporting Is Limited and Not Proactive

Our review of the most recent (2019-20) biennial report provided by the board found that it does include all the statutorily required elements listed above. However, some of the analysis regarding the future of the fund that is provided in the report is limited. We identified an opportunity for the board to be much more proactive in providing the legislature with potential options for moving away from the current public insurance model as the state's backlog of historic releases is completed.

In particular, we found that the board's review and analysis of private insurance options appeared to consist of little more than an online search for providers of underground storage tank insurance and a review of a list of insurers compiled by the Environmental Protection Agency to determine whether any indicate they currently offer coverage in Montana.

Based upon this limited review, the board concluded that "environmental insurance policies within the state of Montana are difficult to obtain and the Fund is a valuable source for both continued protection of public safety, and as an ongoing mechanism for financial responsibility." While this may be true today, as the state continues to wrestle with a substantial backlog of historic releases, the cursory nature of the board's review shows a lack of foresight in planning for a time when the backlog is diminished and insurance is needed only to cover current and future releases. It also provides little in the way of analysis of alternative models as options that would fulfill the statutory financial assurance requirement and provide for protection of human health and the environment.

No Single Prevailing Model for Providing Financial Assurance for Underground Storage Tanks

Our audit work included a review of how several other states have addressed the problems presented by a history of leaking underground storage tanks and the provision of insurance to protect human health and the environment. Our work reviewed different models and incentives for tank owners to participate in their state funds or to obtain their own insurance on the private market. While the federal government requires financial assurance for underground storage tank owners, it does not specify the source of this assurance, or how state funds must be structured, whether they must be mandatory or optional, or other guidelines.

Other states have taken a variety of approaches to studying opportunities to transition owners off a primarily public insurance model. We interviewed state fund staff and other insurance professionals in a number of states. The following are some of the different ways other states have addressed the future of underground storage tank (UST) insurance as their backlogs of historic releases have been diminished.

- ♦ In **South Dakota**, the board of the state's petroleum tank fund is required to annually report and make a recommendation to the legislature regarding whether the fund should continue to act as the primary mechanism to provide federally mandated financial assurance for underground tank owners. State law also requires the South Dakota board to meet annually

with members of the insurance industry, to evaluate the availability of private insurance coverage to clean up contamination from leaking underground tanks. For its most recent report, issued in January 2021, the board reached out to 14 firms or related entities and noted that one private insurance provider indicated it would be interested in entering the market if the state decided to integrate private insurance as a risk-taker in the state. The board's recommendation to the legislature was to keep the fund in place for another year.

- ◆ After years of mandatory participation by tank owners, enrollment in **Utah's** state fund was made voluntary for owners of USTs in 1997. State fund staff estimated that since participation in the program became optional, 70 percent of tanks in the state participate in the program, and 30 percent are privately insured. For owners of multiple tanks at gas stations around the state, for example, the decision whether to participate in the state fund must be made on a company-wide basis, so a firm cannot off-load its most significant risk by putting its older tanks in the state fund program and buying its own, less expensive insurance for newer tanks that are less likely to leak. Companies that opt out of the fund receive a refund of any fuel surcharge they remit to the fund.

Utah's fund is on a 10-year sunset review schedule by the legislature, which must affirm once per decade that the fund continues to serve a valuable role and should remain in place. Fund staff believe this review is appropriate and addresses the question of whether the fund should continue as a means to address a coverage gap that was identified, or whether it has served its purpose and should be eliminated. Utah's fund managers anticipate the state fund will be authorized to remain in place for another decade at its next sunset review, in 2028, but that the review process provides the legislature with an opportunity to periodically analyze whether the fund has outlived its original purpose.

- ◆ Similarly, the state fund in **Colorado** is also subject to sunset review by the legislature to determine whether the fund should remain in place. In Colorado, this review takes place every seven years, with the next scheduled in 2023. To encourage the closure of older releases, Colorado has implemented an incentive program that includes the waiving of the standard deductible and providing financial assistance to owners who want to pull older tanks from the ground (thus potentially discovering leaks that may have taken place many years ago). This helps the state identify long-term liabilities for its fund by making it easier to identify historical contamination.
- ◆ In contrast, **Iowa** privatized its state fund, and the resulting private insurance company now offers policies in multiple other states in addition to Iowa. Management of the company suggested that the firm seeks business in states that do not have state funds, or states that do have state funds but where participation by tank owners is not compulsory. The company provided hypothetical rate estimates for tank owners in Montana that suggest coverage would cost around \$1,000 per tank or \$3,000 per facility per year, with some variance dependent upon tank age, volume, throughput, and other factors. The company further suggested that its rates would work out to around a quarter of a cent per gallon of fuel sold, or roughly one-third of the current fee.
- ◆ In **North Dakota**, management of the state fund was recently moved from the Department of Insurance to the Department of Environmental Quality. The manager of the fund believes the state fund will continue to exist for the foreseeable future. However, staff would like to consider development of an education/prevention program for tank owners, if the amount of

fees collected for the fund exceeds the amount needed to pay for cleanups. Putting resources toward tank owner education and leak prevention would help prevent leaks in the first place, staff believes. More robust leak prevention measures could potentially lower the cost of private insurance as well, provided the data showed a subsequent decrease in the number and severity of leaks.

In addition to states in which we interviewed managers of petroleum release compensation funds, we noted a number of other approaches in other states around the country, including:

- ♦ **Oregon** has never had a state petroleum compensation fund. Instead, the most common way for tank owners to meet the state's financial responsibility requirements is through the purchase of an underground storage tank environmental liability insurance policy and providing proof of the policy to the state's department of environmental quality before an operating certificate is issued.
- ♦ **Texas'** state fund pays for historic releases, but releases that are known to have happened after a certain date are not covered by the fund.
- ♦ **Georgia** has a state fund but does not require participation by tank owners. Owners who opt into Georgia's underground storage tank fund collect and remit a \$0.0075 per gallon fee (the same as Montana's) to fund the program and provide the required financial assurance, but participation in the fund is not required of underground storage tank owners.

Board Could Do More to Plan for Future of the Fund

States around the region and around the country have taken a variety of different approaches to moving away from a pure public model of UST insurance, some with more success than others but all with experiences that Montana might learn from. Each of these states appears to have put significant thought and resources toward what type of underground storage tank insurance is appropriate for current owners and in-use tanks. While Montana's biennial report checks all the statutory boxes, our review of other states confirmed that Montana can do more to plan for the future of the fund.

Multiple states have also researched and developed programs to address issues that their fund faces beyond the notion of private insurance, such as the consideration of leak prevention mitigation and incentivizing the discovery of historical contaminated sites. These programs may also provide steps that streamline the role of the fund and make underground storage tank owners less reliant on public insurance.

Statute requires the board to report every two years on private insurance availability. The most recent biennial report suggests a cursory review of this topic. The board does speak to private insurance in its report, but there is opportunity for a more robust discussion that could even include some analysis of what tank owners might expect to pay for private insurance. One private insurer we spoke to, a company that writes policies in multiple states, indicated competitive rates would be available for Montana tank owners if there were no state fund in place to compete. However, Montana's fund staff did not contact this firm to include its views in its most recent report on private insurance.

It is worthwhile to note that varying environmental standards in different states may affect the ability of tank owners to obtain private insurance policies. Also, the federal Environmental Protection Agency

cautioned that states have had mixed results protecting public health and the environment when moving away from state reimbursement funds.

Montana's backlog of releases will eventually be depleted. Before that time the legislature should be presented with options to consider as it weighs whether to maintain the state fund model for UST insurance. Any transition to private insurance would need time for proper planning and implementation to ensure tank owners would have an opportunity to adjust to a new landscape for financial assurance. The board should plan now to provide the legislature with sufficient information to make this decision when the time comes.

While the board meets the letter of current statute in its biennial report considering the future of the existing fund model, a more thorough consideration of options would provide the legislature with more information on which to base an informed and appropriate decision on the fund's future. In particular, the board's biennial report could place more emphasis on:

- * More substantial analysis of private insurance availability and cost, with input from multiple providers;
- * Analysis of other insurance models in states that are closer to resolving historic backlogs or that have independently moved away from purely public funding of cleanup; and
- * A discussion of whether the fund continues to be needed for nonhistorical contamination.

Ultimately, however, the future of the fund is in the legislature's hands. When the fund was created, a half-century of decrepit and leaking underground storage tanks mandated a strong public response. As that backlog of releases diminishes, the legislature must decide whether it is the role of the taxpayer to continue to fund an ongoing insurance pool for a private industry. The board can provide the legislature with the expertise needed to consider multiple options when weighing the future of the fund. A legislative proposal may present any of several different outcomes, including:

- ◆ A sunset review of the fund by the legislature to determine if the fund is still necessary.
- ◆ A transition away from mandatory contribution to the fund by all fuel distributors (and tank owners).
- ◆ A date after which the fund will no longer provide financial assurance for new underground leaks.
- ◆ A transition to mandatory private insurance for underground storage tank owners.

RECOMMENDATION #4

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to seek legislation that prepares the fund for the eventual closure of all historic underground storage tank release in Montana.

PETROLEUM TANK
RELEASE COMPENSATION
BOARD

...

DEPARTMENT OF
ENVIRONMENTAL QUALITY

BOARD, DEPARTMENT RESPONSES



Petroleum Tank Release Compensation Board

STATE OF MONTANA

P.O. Box 200902 • Helena, MT 59620-0902 • (406) 444-9710

Website: <https://deq.mt.gov/cleanupandrec/programs/ptrcb>

October 1, 2021

Mr. Angus Maciver
Legislative Auditor
Legislative Audit Division
PO Box 201705
Helena, MT 59620-1705

RECEIVED
October 1, 2021
LEGISLATIVE AUDIT DIV.

RE: Response to Administration of the Petroleum Tank Release Cleanup Fund Audit #20P-01.

Dear Mr. Maciver:

The Petroleum Tank Release Compensation Board has reviewed the recommendations contained in the Petroleum Tank Release Cleanup Fund Audit report (#20P-01) and offers the following responses.

When hearing from the rest of the Board and Staff, there was not a one hundred percent (100%) consensus when it came to the recommendations from this audit. With nearly every single recommendation, we received both ends of the spectrum: agree to the recommendations or disagreement to the recommendation. There is a lot of facts and details from those individual responses that were given to myself to include in this response letter. Every person's voice is important and we want to make sure the underlying theme of thoughts from the Board and Staff should be heard. With this response letter, we tried to get those thoughts combined into one response letter document so we have included the individual responses as attachments so if details are not presented in this letter the legislatures can have a reference of details.

Recommendation #1 is to the Board and the DEQ.

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to collaborate during corrective action plan development to verify eligibility, assure fund availability and provide any other relevant input for consideration prior to final plan approval by the department.

Response: Concur

The Board agrees with this recommendation. We encourage all parties to work together and improve the process for all stakeholders. We look forward to putting a planning session together with DEQ and the Board to figure out a front end process to elevate any issues before they become problems. It is beneficial to have the stakeholders at the very front of the process when it comes to selection of process and details of the individual cleanup. This first meeting in our view should include the owner, consultant, DEQ and Petro Fund staff. DEQ is needed to sign off on the closure of a sight and the Petro Fund is there to fund the cleanup process that falls within the statute. At the end of the day the owner can choose whatever process they see fit.

This Board has accomplished a great deal since inception to help advance the cleaning up of Montana. The Board is open to seeing more projects to be brought forward for review and funding.

The Board will make resources available to the Petro Staff so they can continue their great work in the most effective and efficient manner possible.

Recommendation #2 is to Legislature.

We recommend the Montana legislature clarify statute by making amendments as needed to clarify the Petroleum Tank Release Compensation Board does not have a role in approving or basing reimbursement on the specific methods prescribed within approved corrective action plans that bring an eligible petroleum release to closure.

Response: Undetermined

This is one of the recommendations where our Board have strong conflicting opinions. It is easy to see both point of views whether if specific methods should be reviewed by the Board or not. We feel like if the other recommendations are put in place will there be a need to legislative changes in statue? If the Staff are included on the front end meeting and then the cleanup process is done by competitive bid there would not be any reason to legislatively make changes.

We do acknowledge DEQ gives the final say if the property is cleaned up or not. We as the board have an obligation to be the fiduciaries to use the tax payer dollars within the Statue of Montana.

Recommendation #3 is to the Board and the DEQ.

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to develop a process, seeking legislation, if necessary, whereby remediation projects are competitively bid to bring release to closure, in accordance with existing state procurement laws.

Response: Conditionally Concur

Per our fiduciary responsibility, we agree that we must use the tax payer's investment in cleanup to the very best use. We had some disagreeing views on this recommendation. On one hand there is competitiveness through any portions above \$2,500 and then there is cost control by using averages. On the flip side there is only one competing prime leader when the owner selects a consultant. Could we move to a prime bid process to do the entire project where the bids are sealed with bonding requirements like a State highway project? There are hurdles how the structure of the process is operating right now. The owner's consultant does the front end analysis on options for the remediation then DEQ decides which one of those plans makes the most sense. Could the process move to where DEQ designs the plan then sends it out to the public to respond to for a bid? We do acknowledge the consultants are more than processors of tasks in the process of a cleanup, their expertise and knowledge is an important part to getting a site to closure. This would be a big shift in the process to bring different consultants or general contractors for the completion of the work for a competitive bid. We would welcome a discussion with all stakeholders to get their ideas on a competitive bid process.

Recommendation #4 is to the Board and the DEQ.

We recommend the Petroleum Tank Release Compensation Board work with Department of Environmental Quality to seek legislation that prepares the fund for eventual closure of all historic underground tank release in Montana.

Response: Partially Concur

We appreciate the recommendation noticing that the Board does make sure to provide a comprehensive biennium report for the public and legislature. We do understand program that are funded by taxation should be looked at on a continual basis. We would be happy to include more detail on the particular area of the biennium report for the future of the Petro Fund which would include: liability tails, new legislation on existing claims, above ground storage tanks, private insurance, deadlines and numerous other items.

We do feel it would be great to do a dive into more cleanups especially when there is the funding mechanism available to do so. We feel there are numerous claims outstanding plus unknown claims that have not been addressed. We feel we are decades away from getting the back log of those claims resolved. With that said, we welcome bringing ideas to all stakeholders about the future of the Petro Fund.

Please thank all your staff for their hard work and professionalism. We appreciate the insights they have been able to provide. We look forward to working with all the stakeholders to meet the needs of the citizens of Montana.

Sincerely,

A handwritten signature in blue ink that reads "Keith Schnider". The signature is fluid and cursive, with the first name "Keith" and last name "Schnider" clearly distinguishable.

Keith Schnider

Presiding Officer

Petroleum Tank Release Compensation Board



September 21, 2021

Mr. Angus Maciver
Legislative Auditor
Legislative Audit Division
PO Box 201705
Helena, MT 59620-1705

RECEIVED
September 21, 2021
LEGISLATIVE AUDIT DIV.

RE: Administration of the Petroleum Tank Release Cleanup Fund Audit #20P-01

Dear Mr. Maciver,

Thank you for the opportunity to respond to the performance audit of the Administration of the Petroleum Tank Release Cleanup Fund (Fund). As the audit report outlines, the Petroleum Tank Release Compensation Board (Board) administers the Fund. The Board is not directed by Department of Environmental Quality (DEQ) staff and is attached for administrative purposes only. The Audit identifies that there are integral coordination efforts and interactions between all aspects of underground storage tanks as they relate to leak prevention efforts, addressing and cleanup of petroleum releases, and the Fund.

We reviewed the recommendations contained in the report and provided our responses on behalf of the Department below.

Recommendation #1 is to the Petroleum Tank Release Compensation Board.

We recommend the Board work with the DEQ to collaborate during corrective action plan development to verify eligibility, assure fund availability and provide any other relevant input for consideration prior to final plan approval by the department.

Response: Concur

DEQ agrees with this recommendation. DEQ currently includes Board staff as recipients on its letters addressed to responsible parties for work plan requests, approvals, modifications, and extensions. DEQ has and continues to provide Board staff with copies of work plans for investigation and remediation sent out for county sanitarian comments; and inform Board staff that the work plan will be approved within 15 days in accordance with the Administrative Rules of Montana (ARM). The Board has no rule directing it to review and approve/disapprove documentation submitted within a certain time frame. Because the Board has no timeframe mandated in statute or by rule, its review could slow the turn-around time which may put DEQ outside of its required response time.

In addition, DEQ has requested the Board cover the cost of and attend coordination and planning meetings to gain stakeholders' approval of scope, prior to submittal of a work plan. These meetings rarely occur. As the Board staff have not historically covered the costs for these meetings the consultants don't want to attend without compensation, and the responsible party (owner/operator) doesn't want to pay out-of-pocket when they believe the Fund should cover the cost.

DEQ is willing and eager to work collaboratively with the Board and staff to explore options and develop improvements to the Board's eligibility processes and ensure funds can be obligated to close sites in a timely and efficient manner. DEQ recognizes this recommendation will likely require a statute change (75.11.309).

Recommendation #2 is to Legislature.

We recommend the Montana legislature clarify statute by making amendments as needed to clarify the Petroleum Tank Compensation Board does not have a role in approving or basing reimbursement on the specific methods prescribed with approved correction plans that bring eligible petroleum release to closure.

Response: Concur

DEQ agrees with this recommendation. It would be helpful if there was clarity in statute and legislative intent for roles and responsibilities regarding what is needed for environmental protection and technical methodology or requirements of corrective action plans to bring releases to closure. The technical review and development of workplans should solely fall to environmental scientists, working with professional consultants with specific knowledge, skills, and ability to oversee workplans and address site cleanup efforts. DEQ agrees to work with the legislature, the Board and stakeholders to assist with amendments as needed to clarify statute to address recommendation #2 (75.11.309(3aii); 75.11.312; 75.11.318(4c)).

Recommendation #3 is to the Petroleum Tank Release Compensation Board.

We recommend the Petroleum Tank Compensation Board work with Department of Environmental Quality to develop a process, seeking legislation if necessary, whereby remediation projects are competitively bid to bring release to closure, in accordance with existing state procurement laws.

Response: Concur

DEQ is willing and eager to work collaboratively with the Board and staff to explore options and determine a streamlined process for how improvement can be made to bring releases to closure. Implementation of this recommendation would directly impact external stakeholders such as consultants and owners/operators. For example, the owner/operator would lose the ability to select their consultant and may become less engaged in the cleanup process. There could be an increase in overall costs if a new consultant was hired for each phase of work (due to discontinuity of project knowledge) and consultant time is likely to will increase with preparing bid documents. Stakeholder involvement will be critical for implementation of this recommendation. Exploring a competitive bid process to bring releases to closure is an important step toward project evaluation, improving delivery, and regulatory reform.

For other site cleanup efforts led by DEQ using other funding sources (such as one-time appropriation of funds for non-eligible petroleum releases), DEQ uses a competitive bidding process that complies with state procurement laws. Any process changes and impact to cost eligibility and determination to obligate funds, must ensure that projects can be managed with resources available and in a manner that ensures increased efficiency and long-term success.

Recommendation #4 is to the Petroleum Tank Release Compensation Board.

We recommend the Petroleum Tank Compensation Board work with Department of Environmental Quality to seek legislation that prepares the fund for eventual closure of all historic underground tank release in Montana.

Response: Concur

DEQ agrees with this recommendation. Sometime in the future, the historic backlog of petroleum releases will be addressed. However, each year new releases are discovered. In accordance with the ARM 17.56.805, underground storage tank owners/operators must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental release arising from the operation of petroleum underground storage tanks. Under ARM 17.56.815, an owner or operator may satisfy any part of its financial responsibility requirements by using the Montana petroleum tank release cleanup fund. Many owners and operators rely on the fund and the statement of tangible net worth to satisfy the financial assurance requirements. There are other mechanisms of financial responsibility that exist. As the audit outlines, other states have different funding structures that are used and should be evaluated. DEQ will work with the Board and staff on this recommendation, as the Board leads this effort.

I want to thank you and your staff for the professionalism during the audit. We appreciate the willingness of the auditors to discuss recommendations and respond to our questions. We look upon the audit process as an opportunity to improve operations and performance.

Sincerely,



Christopher Dorrington
Director
Department of Environmental Quality

cc: Keith Schnider, PTRCB Chair
Terry Wadsworth, Executive Director PTRCB
Jenny Chambers, Division Administrator, DEQ